

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Leila Green Little, et al.,

Plaintiffs,

v.

Llano County, et al.,

Defendants.

Case No. 1:22-cv-00424-RP

**Opposed Motion To Expedite Consideration In Part Of Defendants’
Motion To Compel Return Of Privileged Documents**

On May 8, 2023, the defendants filed an opposed motion to compel the return of privileged e-mails among attorney Jonathan F. Mitchell and his clients, Gay Patek and Bonnie Wallace, which were inadvertently produced to plaintiffs’ counsel during discovery (ECF No. 167). The defendants also asked the Court to immediately order the clerk to seal docket entry 151-2 and enjoin plaintiffs’ counsel from using or disclosing these e-mail communications until the privilege dispute is resolved.

The defendants respectfully ask the Court to expedite consideration of this motion in part, by ordering the plaintiffs to show cause by 5:00 P.M. on Friday, May 12, 2023, why the Court should not immediately seal docket entry 151-2 and enjoin plaintiffs’ counsel from using or disclosing the e-mail communications among Mr. Mitchell, Ms. Patek, and Ms. Wallace. The plaintiffs have already violated Rule 26(b)(5)(b) and paragraph 33 of the ESI agreement (ECF No. 74) by attaching the unredacted e-mails as an exhibit to docket entry 151-2 after we had informed them that we were asserting attorney–client privilege over those communications. These e-mails are now available to the public on PACER, and the Court must act swiftly to protect their confidentiality until the privilege claims are resolved.

We have proposed that plaintiffs' counsel to agree to a stipulated order that temporarily seals docket entry No. 151-2 until the courts resolve the privilege issue, and that orders the plaintiffs not to use or disclose Mr. Mitchell's e-mail communications with Ms. Patek until the privilege dispute is resolved. On May 9, 2023, we e-mailed plaintiffs' counsel and wrote:

We will be filing a motion in the district court to expedite IN PART consideration of ECF No. 167. Specifically, we will ask the Court to expedite consideration of our request to immediately enjoin you from further use or disclosure of my communications with Ms. Patek until the courts resolve the privilege issue, and to immediately (but temporarily) instruct the district court to seal ECF No. 151-2 until the privilege dispute is resolved.

We can avoid this motion if you agree to a stipulated order that temporarily seals ECF No. 151-2 until the courts resolve the privilege issue, and that orders you not to use or disclose my communications with Ms. Patek until the privilege dispute is resolved. If you are willing to consent to a stipulated order along these lines, please let us know and I will draft it.

Mitchell Decl. ¶ 4 (attached as Exhibit 1). Later that day, plaintiffs' counsel responded and said:

[W]e do not consent to your motion to expedite consideration of your motion regarding your communications with Ms. Patek, as we maintain those communications are not privileged.

Id. at ¶ 5. But it does not matter whether plaintiffs' counsel agrees with our assertion of privilege. Under both Rule 26(b)(5)(B) and paragraph 33 of the ESI agreement, the mere fact that we have asserted privilege obligates plaintiffs' counsel to preserve the confidentiality of those e-mails until the courts decide whether the documents are privileged. Plaintiffs' counsel appears to be under the impression that they can use and publicly disclose the disputed e-mail communications until this Court declares them protected by the attorney–client privilege. The Court should disabuse them of that

notion and protect the confidentiality of these e-mails until the defendants' assertions of privilege are resolved.

Respectfully submitted.

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Dated: May 10, 2023

Counsel for Defendants

CERTIFICATE OF CONFERENCE

I certify that on May 9, 2023, I e-mailed counsel for the plaintiffs requesting their position on this motion. Attorney Marissa Benevides, counsel for the plaintiffs, responded to the e-mail and informed me that the plaintiffs oppose this motion.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on May 10, 2023, I served this document through CM/ECF upon:

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